IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO.1715 OF 2004

Balbir Kaur,
an Indian inhabitant,
residing at B/28, Green
View Apartment, Sector 9,
Rohini, New Delhi-110 085. .... Petitioner

- Versus -

1. The State of Maharashtra,
through the Secretary to
the Govt. of Maharashtra,
Home Department, Mantra-
laya, Mumbai-400 032.
2. Neela Satyanarayana,
the Principal Secretary
to the Government of
Maharashtra, Home Depart-
ment (Appeals and Security)
and Detaining Authority,
Mantralaya, Mumbai-400 032.
3. The Superintendent of Prison,
the Mumbai Central Prison,
Arthur Road, Mumbai.
4. The Superintendent of Prison,

Nasik Road Central Prison,
Nasik. .... Respondents

Shri Maqsood Khan for the Petitioner.
Shri B.R. Patil, Public Prosecutor,
for the Respondents.

CORAM: R.M.S. KHANDEPARKAR &
P.V. KAKADE, JJ.
DATED: JANUARY 13, 2005

ORAL JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Heard the learned Advocates for the parties. Perused the records. The facts and the contentions sought to be raised are identical to the case of Shri Tejpal Mann Singh in Criminal Writ Petition No.1714 of 2004, disposed of yesterday i.e., 12-1-2005.

2. The petitioner, who has filed this petition in her capacity as the next friend of the detenu Shri Inderjeet Hunjun, challenges the order of detention dated 6-2-2004 issued by the respondent No.2 against the said detenu under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, hereinafter referred to as "the COFEPOSA Act", on two grounds, namely, the impugned order being passed

without consideration of the representation dated 7-9-2004 made by the detenu through his Advocate, and secondly on the ground that the order of detention against the detenu discloses total non-application of mind by the authority who has passed the said order.

3. Pursuant to the intelligence report received by the Directorate of Revenue Intelligence, Mumbai that the detenu and one Tejpal Singh would be arriving at Mumbai from the domestic airport of Chennai carrying huge quantity of computer parts smuggled into India, the detenu and the said Tejpal were intercepted at the Santacruz domestic airport, Mumbai on 5-9-2003. Certain computer parts were seized by the customs authorities from the detenu and the said Tejpal under the reasonable belief that they were smuggled goods. Statements under Section 108 of the Customs Act, 1962 of the detenu and the said Tejpal came to be recorded on 6-9-2003 and they were arrested on 7-9-2003 and remanded to custody pursuant to the order by the Magistrate. Various statements of different persons were thereupon recorded during the period from September to October, 2003 and the order for detention of the detenu under Section 3(1) of the COFEPOSA Act came to be issued on 6-2-2004, which was served upon the detenu on 28-7-2004. The detenu made two representations - one on 25-8-2004 and another on 7-9-2004 while being under detention. By

communication dated 24-9-2004 the detenu was informed about the rejection of his representation dated 25-8-2004. Meanwhile, the present petition came to be filed on 24-8-2004 on various grounds challenging the detention, including the ground regarding non-application of mind by the detaining authority while passing the impugned detention order. Subsequent to the communication dated 24-9-2004, the petition was amended and the ground regarding non-consideration of the second representation was raised. The respondent No.2 as well as the Under Secretary to the Government of Maharashtra and the Deputy Director of the D.R.I. have filed their affidavits in reply to the petition. There is also an affidavit filed by the Jailor, attached to the Nasik Road Central Prison.

4. Though the petition is filed challenging the detention on various grounds, the learned Advocate for the petitioner has restricted his challenge to the impugned order on two grounds. Firstly, it is the contention of the learned Advocate for the petitioner that the detenu had addressed a representation dated 7-9-2004 through his Advocate to the detaining authority and was delivered in the office of the detaining authority on 8-9-2004. It is the further contention on behalf of the petitioner that the representation dated 7-9-2004 was specifically raising two grounds - one to

the effect that in the absence of locating and arresting Jinder Singh, Babban, Surendrakumar and Pramod Kumar who were referred to in the various statements recorded by the investigating machinery in the course of the investigation pursuant to the seizure of the goods and arrest of the detenu, and since the detention order was passed with the intention to curb the alleged smuggling activities allegedly carried on by the detenu in connivance with those persons, the purpose of passing of the detention order was not served as those persons were free to carry on the smuggling activities even after the detention of the detenu. Secondly, on the ground that in the absence of passport with the detenu, as the same having been already seized, there was no justification for detaining the detenu and a normal penal remedy would have been sufficient to take care of the apprehension on the part of the detaining authority and in that regard reliance was placed in the decision of the Apex Court in the matter of **Rajesh Gulati v. Government of NCT of Delhi,** reported in Supreme Today 2002 (6) Supreme 37. It is the contention of the learned Advocate for the petitioner that inspite of the fact that these two specific grounds were raised in the representation dated 7-9-2004, which were in addition to the grounds taken in the earlier representation dated 25-8-2004, the said representation was not at all considered nor any decision in that regard was communicated to the detenu

and therefore the continued detention of the detenu is illegal and null and void. Reliance is placed in that regard in the decisions of the Apex Court in the matter of **Harish Pahwa v. State of U.P.,** reported in AIR 1981 SC 1126, **Prem Lata Sharma (Smt.) v. District Magistrate, Mathura and others,** reported in 1998 SCC (Cri.) 831 and **Solomon Castro v. State of Kerala and others,** reported in (2000) 9 SCC 561 as well as an unreported decision of the Division Bench of this Court in the matter of **Kanchan Harish Gandhi v. State of Goa and others** {Criminal Writ Petition No.714 of 2004} delivered on 23-9-2004. The impugned order is also challenged on the ground that the same has been issued against the detenu for smuggling of goods which activity falls under Section 3(1)(i) of the COFEPOSA Act. However, the materials placed before the detaining authority would at best disclose the alleged activity to be covered under Section 3(1)(iii) of the COFEPOSA Act i.e. to engage in transporting smuggled goods. This according to the learned Advocate is also apparent from the further proceedings in relation to the bail application as well as from the fact that the goods allegedly brought by the detenu were OGL items and the burden in that regard was squarely upon the department to establish that the goods were smuggled goods into India by the detenu which the department had failed to establish. However, the concerned authority has failed

to apply its mind to the said facts and circumstances as well as the materials placed before it while passing the impugned order and therefore the same is vitiated and needs to be quashed.

5. The learned A.P.P., on the other hand, drawing attention to the affidavit filed by the respondent No.2 on 11-12-2004 and particularly to para 2 thereof, has submitted that the representation dated 7-9-2004 was received in the office of the respondent No.2 on 8-9-2004 while preparing the parawise comments in relation to the representation dated 25-8-2004 and therefore both the representations were considered together and intimation was given to the detenu about the rejection of the representation. According to the learned A.P.P., there was no need to issue separate intimation regarding rejection of the representation dated 7-9-2004 as the grounds which were sought to be raised in the said representation were clearly available to the detenu at the time when the representation dated 25-8-2004 was made and the contentions which were sought to be raised in the representation dated 7-9-2004 did not disclose any ground based on any new or fresh material or subsequent event and therefore mere non-communication of the decision on the representation dated 7-9-2004 would not render the continued detention to be illegal. According to the learned A.P.P., the

records disclose that the decision on the said representation dated 7-9-2004 was taken prior to 24-9-2004. Reliance is sought to be placed in the decision of the Apex Court in the matter of **Abdul Razak Dawood Dhanani v. Union of India and others,** reported in 2004 SCC (Cri.) 1177 in support of the contention sought to be raised on behalf of the respondents. Reliance is also placed in the decision in the matter of **T.P. Moideen Koya v. Government of Kerala & others,** reported in JT 2004 (8) SC 383 contending that the availability of the grounds at the time of the first representation and failure to raise those grounds in the first representation would not entitle the detenu to file subsequent representation in respect of such grounds once he has omitted to raise such grounds in the first representation.

6. It is not in dispute that the decision on the first representation dated 7-9-2004 was not communicated to the detenu at any point of time. The communication dated 24-9-2004 reads thus:-

> "I am directed to refer to your representation dated 25th August, 2004, addressed to Principal Secretary (Appeals and Security), Government of Maharashtra, Home Department,

> Mantralaya, Mumbai-32, which was received in the Home Department on 30th August, 2004, through Superintendent Nashik Road Central Prison, Nashik, and to state that the said representation has been separately and independently considered by the Principal Secretary (Appeals and Security), Home Department, Government of Maharashtra who is specially empowered under Section 3(1) of Cofeposa Act, 1974 vide Government Notification, Home Department No.MIS-2003/CR-3/SPL-3(A), dated 3rd June, 2003, and it is regretted that your representation has been rejected by the Principal Secretary (Appeals and Security), Home Department, Government of Maharashtra, as Detaining Authority."

Plain reading of the said communication, therefore, would disclose that it related exclusively to the representation dated 25-8-2004 which was received in the Home Department on 30-8-2004. The communication nowhere refers to, in any manner, to the representation dated 7-9-2004, besides the communication specifically refers to "representation" and not to "representations".

7. Undoubtedly, the respondent No.2 in her affidavit has stated that:-

> "I state that during the time when the said representation dated 25.8.2004 was under consideration, the Advocate of the detenu had submitted another representation dated 7.9.2004 which was received in my office on 8.9.2004. I state that while preparing the parawise comments in respect of the representation dated 25.8.2004 the parawise comments were also prepared in respect of the representation dated 7.9.2004. I state that thus, both these representations were considered together by me and the prayer of the detenu to revoke the Order of Detention was rejected on 23.9.2004 and the detenu was informed vide letter dated 24.9.2004 that his representation was rejected. I state that since both the representations were considered with together and rejected after perusal of the parawise comments prepared in respect of both the representations and hence, it was not necessary to give

separate reply for rejection of the representation dated 7.9.2004."

The above statements apparently disclose the clear admission on the part of the respondent No.2 about the failure on the part of the respondents to communicate the decision on the representation dated 7-9-2004. At the same time, neither the affidavit nor any other material on record discloses that the ground which were raised in the representation dated 7-9-2004 were either identical to or similar or the same as those were raised in the representation dated 25-8-2004. On the contrary, the statements in the affidavit and quoted above apparently disclose parawise consideration of both the representations and yet the concerned authority did not find any repetition or reiteration of any earlier ground in the representation dated 7-9-2004 or any of the grounds which were raised in the representation dated 25-8-2004. The learned A.P.P. has also fairly conceded that there were two additional grounds which were raised in the representation dated 7-9-2004. However, his contention is that firstly those grounds were available to the detenu at the time when the representation dated 25-8-2004 was made and secondly that those grounds in the representation dated 7-9-2004 were not based on any new material or any subsequent events as such.

8. The decision of the Apex Court in **T.P. Moideen Koya's** case (supra) is to the effect that while hearing a special leave petition against the judgment of the High Court dismissing a habeas corpus petition wherein a prayer has been made to set a detenu at liberty, the Court would normally examine same grounds, namely, whether the detention order is in conformity with Article 22(5) of the Constitution of India and the provisions of the enactment under which the detention order has been passed, the procedural safeguards have been observed and also whether the continued detention of the detenu has not been rendered invalid on account of any breach of the duty cast upon the authorities. A decision rendered by the Apex Court in proceedings under Article 136 of the Constitution which has attained finality, would bind the parties and the same issue cannot be re-agitated or reopened in a subsequent petition under Article 32 of the Constitution and the subsequent petition under Article 32 of the Constitution of India seeking a writ of habeas corpus for setting at liberty, a person who has been detained under any of the detention laws would be maintainable if the circumstances have changed. It would also be maintainable on the grounds which were not available when the earlier petition was decided. Referring to the said decision, it was sought to be contended that the availability of the grounds at the time of the first

representation and non-raising of such available grounds would debar the detenu from raising those very grounds in the subsequent petition. The contention is totally devoid of substance. The ruling in T.P. Moideen Koya's case is in relation to Writ Petitions to be filed in the High Court and the Apex Court. The ruling does not apply to the representation to be made by the detenu in exercise of the right assured under Article 22(5) of the Constitution of India. In fact the law on the point of successive representation is well-settled and it is not necessary to deal about the same any further. Merely because the detenu, inspite of the ground being available, failed to raise such ground in the first representation, that would not debar the detenu from raising such ground in the subsequent representation. Undoubtedly, the fresh representation has to disclose a new ground or fresh materials or any subsequent event as has been held by the Apex Court in **Abdul Razak Dawood Dhanani's** case (supra), which is relied upon by the learned A.P.P. himself.

9. A perusal of the copy of the representation dated 7-9-2004 apparently discloses the grounds relating to the detention order being rendered futile in the absence of necessary proceedings against Jinder Singh and others and more particularly in view of the fact that the detenu having been accused of being a carrier for Jinder

Singh and secondly about the non-consideration of the fact that the passport of the detenu was seized by the D.R.I. and was in possession of the D.R.I. and, therefore, there was no occasion for the detenu to travel abroad and for the same reason, there was no need to issue the detention order and rather the regular penal remedy would have been sufficient in the facts and circumstances of the case and in that regard reliance was placed in the decision in **Rajesh Gulati's** case (supra). Undisputedly, these grounds were not raised in the representation dated 25-8-2004. Being so, it was absolutely necessary for due compliance of the provisions of Article 22(5) of the Constitution of India that the authority should have considered the representation dated 7-9-2004 and ought to have taken a decision on the said representation and then ought to have communicated the same to the detenu, without delay. It is to be noted that the Apex Court in **Solomon Castro's** case (supra) had quashed the detention on account of failure to explain and justify the delay of 19 days in communicating the decision on the representation made by the detenu in the said case. The detenu had made the representation on 20-3-1999. The remarks from the sponsoring authority were received by the detaining authority on 9-4-1999. Pursuant to the decision, a letter for communication thereof was prepared by the detaining authority on 23-4-1999.

However, the decision was communicated to the detenu only on 28-4-1999. While quashing the impugned order of detention, it was observed by the Apex Court that:-

> "It has been repeatedly stated by this Court that representation of the detenu is required to be considered and disposed of as expeditiously as possible by the Government. In Rajammal v. State of T.N. {(1999) 1 SCC 417 : 1999 SCC (Cri.) 93} this Court again reiterated the constitutional obligation of the Government to consider the representation forwarded by the detenu without delay and observed that even though no period is prescribed by Article 22 of the Constitution for the decision to be taken on the representation, the words "as soon as may be" in clause (5) of Article 22 convey the message that the representation should be considered and disposed of at the earliest. If there is delay in considering the representation the court can consider whether the delay was occasioned due to permissible reasons or unavoidable

> causes. In the present case there is absolutely no explanation for justifying the delay between 9-4-1999 to 23-4-1999 and thereafter till 28-4-1999. In this view of the matter, the impugned order passed by the detaining authority requires to be quashed and set aside."

10. In **Harish Pahwa's** case (supra), the Apex Court had ruled that:-

> "We would emphasise that it is the duty of the State to proceed to determine representations of the character above mentioned with the utmost expedition, which means that the matter must be taken up for consideration as soon as such a representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu."

11. In **Prem Lata Sharma's** case (supra), the Apex Court held that when the representation was addressed to the Central Government, it was incumbent on the part of the

detaining authority to forward the same to the Central Government and not to take preemptive action thereupon of its own. It was further held that the refusal on the part of the detaining authority to sent the representation of the detenu to the Central Government resulted in denial of the rights conferred upon the detenu under Article 22(5) of the Constitution of India to persuade the Government to revoke the order of detention under Section 14 of the National Security Act, 1980 and on that ground his continued detention had become illegal.

12. Considering the facts and circumstances of the case in hand and the law laid down by the Apex Court on the point in issue, it is, therefore, apparent that there was total failure on the part of the respondents in taking prompt decision on the representation dated 7-9-2004 made by the detenu through his Advocate and to communicate the said decision to the detenu, resulting in the breach of the provisions of law comprised under Article 22(5) of the Constitution of India rendering the continued detention of the detenu from 24-9-2004, the day on which the decision on the first representation was communicated to the detenu, to be illegal which warrants direction to the respondents to release the detenu forthwith, unless required in any other matter. In the circumstances, it is not necessary to deal with

the second ground of challenge.

13. In the result, the continued detention of the detenu from 24th September, 2004 is held to be illegal. The Respondents are directed to release the detenu Shri Inderjeet Hunjun forthwith unless required in any other matter. The rule is made absolute accordingly with no order as to costs.

(R.M.S. Khandeparkar, J.)

(P.V. Kakade, J.)